Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-260

L. N. McDONALD, *et al.*,

Petitioners,

v.

SANTA FE TRANSPORTATION CO., *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

N.A.A.C.P. Legal Defense and Educational Fund, Inc., hereby moves for leave to file the attached brief as *amicus curiae.*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation

before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court. The proposed brief is submitted in support of respondents though advancing reasons somewhat different than those relied on by the courts below.

WHEREFORE, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

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Argument

All parties to this case, as well as the courts below, agree that white employees alleging discrimination on the basis of race may sue under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e.[1] The procedural requirements for a Title VII action were clearly met. Petitioner McDonald was discharged on October 2, 1970, and filed a grievance with the union on that day. The grievance was resolved against McDonald on October 29, 1970; the discharge only

[1] Appendix, pp. 4, 63, 105, 121-22.

became final upon the completion of grievance proceedings and the statutory period for filing a charge with the Equal Employment Opportunity Commission was tolled pending those proceedings.[2] Within the 180 days after the rejection of his grievance McDonald filed the requisite charges with the E.E.O.C. against both the company and the union.[3] Since this case was commenced as a class action, it was not necessary for petitioner Laird to file a separate Title VII charge. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975).[4] All the relief sought by petitioners in their Second Amended Complaint is within the broad remedial power of the court in a Title VII action.[5]

Since jurisdiction over this action exists under Title VII, it appears unnecessary to reach the more difficult and far reaching question of whether white employees may sue under 42 U.S.C. § 1981. If, however, the Court reaches that question and concludes that the phrase "as is enjoyed by white citizens" is "superfluous language, the substance of which would in no way alter the substance of the statute",[6] amicus believes that section 1981 must be construed not merely to protect whites against racial discrimination, as urged by petitioners and various amici, but also to prohibit all forms of invidious discrimination—on the basis of sex, age, national origin, etc.

[2] *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez* v. *T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).

[3] Appendix, pp. 115, 118. The 1972 amendments to Title VII extended the period of time within which to file such charges from 90 to 180 days, and apply to all pending litigation. See Pub. L. 92-261; 42 U.S.C. § 2000e-5(d); *Davis* v. *Valley Distributing Co.*, [illegible] F.2d [illegible] (9th Cir. 1975). 522 879

[4] If the class action aspect of the case were dismissed, Laird and other putative class members would be entitled as of right to intervene in this action although the relevant deadlines had by then passed. *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974). Whether Laird himself filed a timely charge with EEOC is a matter of dispute. Appendix, pp. 115-116.

[5] Appendix, pp. 41-42; 42 U.S.C. § 2000e-5.

[6] Brief of Petitioners, p. 25.

An allegation of racially motivated unequal discipline for identical misconduct, even criminal misconduct, by similarly situated employees states a cause of action under Title VII, regardless of whether the victim of the alleged discrimination is black or white. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court held that an employer might justifiably refuse to hire an employee who engaged in unlawful acts against it "but only if this criterion is applied alike to members of all races." 411 U.S. at 804. If the employer in this case maintains a general policy of firing whites who steal but forgiving blacks who do so, or vice versa, such a policy would turn the theft into a pretext for mistreating the disfavored race. An allegation of such a policy might be supported by evidence that black employees known to the company to be as culpable as petitioners, and whose cases presented comparable mitigating factors, were not discharged. Other relevant evidence would include whether or not the employer had a practice of not hiring white applicants, of confining white employees to menial low-paying jobs, or of using tests with a disproportionate racial impact on whites. In a case, unlike this one,[7] where an employee challenged the good faith of an employer's conclusion that he was guilty and others innocent, of the misconduct charged, an inquiry might be required as to who was indeed culpable and what reason the employer had to believe otherwise.

[7] Since no such allegation was made, whether petitioner actually stole the anti-freeze, as he now appears to deny, need not be resolved.

As petitioners correctly recognize,[8] the cause of action accorded white employees under Title VII does not confer a right to thwart or deter actions by an employer, whether voluntary or court ordered, to end past discrimination against blacks or to overcome the continuing effects of such discrimination. If in the past a white employee has enjoyed the illicit benefits which are the windfall whites often receive when black employees are mistreated, such a white employee cannot complain if he is restored to his rightful place and is subject to the terms and conditions of employment which would have applied to him had there been no discrimination. An employer who defends a remedial policy is not obligated to establish, in the manner and detail which would have been required of a black employee suing for such a relief, that it had engaged in systemic racial discrimination or that the remedy it chose was that which would have been selected by a federal court. Such a requirement would frustrate the statutory policy of encouraging employers to voluntarily examine their employment practices and correct any discrimination. *Albemarle Paper Co.* v. *Moody*, 472 U.S. 405 (1975). Only the most courageous of employers would voluntarily implement a remedy if they did so at peril of liability to white employees should they fail to guess the precise remedy a court might years later find appropriate. An employer need only establish that the remedy it has chosen is reasonably related to a palpable claim of prior discrimination against blacks.

The expectations aroused by a past practice of discrimination in favor of whites may prompt a white employee to perceive injustice in an end to that favoritism.[9] The

[8] Brief of Petitioners, p. 42.

[9] "Title VII guarantees that all employees are entitled to the *same* expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971).

extensive discovery in this action clearly indicates this is such a case. Although the complaint alleges there are "numerous" whites who have been subject to discriminatory dismissal,[10] the plaintiffs were the only employees fired at the Houston Terminal during the year involved.[11] It is not disputed that, on or about September 26, 1970, plaintiff McDonald, a truck driver whose route included the SMS Company, returned from its plant with approximately ten cases of antifreeze manufactured by that firm. On arriving at the Santa Fe Terminal, McDonald admittedly sold some of that antifreeze to a number of fellow employees, black and white, with the knowledge and assistance of plaintiff Laird, who was McDonald's supervisor. When the transaction came to light detectives employed by the Company investigated several dozen employees, including plaintiffs. McDonald conceded he had sold the antifreeze but maintained that the antifreeze was a gift to him from the SMS company;[12] the company concluded, however, that McDonald had stolen the antifreeze from SMS; and therefore dismissed McDonald for theft and Laird for failing to deal effectively with the problem of theft.[13] The black employee involved, Charles Jackson, was merely one of the employees who had purchased the antifreeze from McDonald; since McDonald had advised him the antifreeze was lawfully acquired there was never any question that Jackson was culpable.[14] Even if Jack-

[10] Appendix, p. 36.

[11] Id., p. 33.

[12] See deposition of L. N. McDonald, pp. 10-14.

[13] Appendix, p. 32.

[14] See deposition of Charles Adrian Jackson.

son had reason to suspect the goods were stolen, his purchase was manifestly less culpable than the actual theft, and was mitigated by his active cooperation with the company's investigation.[15] The only question of fact genuinely in issue is whether the company erred in concluding McDonald obtained the antifreeze by theft rather than as a gift, but such a mistake would not violate Title VII. Under the circumstances this case appears ripe for summary judgment. *Mourning* v. *Family Publications Service,* 411 U.S. 356, 362, n. 16 (1973).

Respectfully submitted,

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[15] *Id.*